JUDGE JEROME FRANK

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FEW SUCH brilliant, original and many-sided men as Jerome Frank have ever attained judicial eminence in the history of any bench, here or abroad. He was an economist in the sense that he knew and could compare all of the different theories by which men of various and conflicting doctrinaire views strove to create principles which, if followed, would make a nation's economy rational, scientific and neat as a trivet or an apple pie. He also knew, perhaps better than any other living judge, the practical problems of finance. As Mr. Justice Douglas recently pointed out,[1] Jerome Frank "had no superior when it came to an understanding of the ways of high finance and to an analysis of regulatory measures dealing with it." This practical knowledge prevented him from ever being caught in the web of any economic doctrine. He was a lawyer of great technical skill, and he had an extraordinary grasp of the deductive system of wheels within wheels which gives the law its appearance of predictability. He also read widely and with complete skepticism the literature of that brooding omnipresence in the sky known as Jurisprudence or the higher law. He was a student of psychiatry and was able to use that knowledge in his treatment of legal problems.

As a writer, he developed a legal philosophy which had tremendous impact on the legal thinking of our time. On the bench, he produced a series of judicial opinions outstanding in their uniform fairness, equity and economic soundness. He was never willing to reach a result which did not conform to these standards unless he felt compelled to do so by controlling authority. When forced by *stare decisis* to reach what he considered an undesirable result he would write a concurring opinion analyzing the problem and plainly suggesting that either the Supreme Court or Congress do something about it. It was a unique and useful technique whereby a lower court judge could pay allegiance to precedent and at the same time encourage the processes of change. The number of writs of certiorari granted by the Supreme Court on the basis of his dissents or concurring opinions is, I am informed, greater than in the case of any other circuit judge.[2]

As a judge he only had one disqualification. He lacked that narrowness of purpose, that preoccupation with the law as a separate discipline, that exclu-

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[1] Alleghany Corp. v. Breswick & Co., 353 U.S. 151, 178 (1957) (dissenting opinion).

[2] Writing under a deadline I have not had time to check this statement.

sion of social and economic considerations, which removes the "Law" from the everyday world and thus makes it such an impressive and important symbol of abstract impersonal justice. It may well be that Jerome Frank was not solemn enough to personify that symbol. Certainly it is true that the idea of federal judges roaming the stormy fields of economics, sociology, psychiatry and anthropology, their black robes flapping in the winds of controversy, is a disquieting one, even to the writer.

Perhaps Jerome Frank did not give adequate consideration to the importance of authoritarian law based on human reasoning and respected with mystical faith. In my view, this ideal is the cement which holds a free society together. The ideal of a judiciary which discovers its principles through the enlightened application of established precedents dramatizes that most important conception that there is a rule of law above men. In that sense, law must be a "brooding omnipresence in the sky." This is an ideal which can never be attained, but if men do not strive for it the law loses its moral force. Yet Jerome Frank wrote in 1930:

> Modern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly *the* modern sin. *The modern mind is a mind free of childish emotional drags, a mature mind.* And law, if it is to meet the needs of modern civilization must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change. It must become avowedly pragmatic. To this end there must be developed a recognition and elimination of the carry-over of the childish dread of, and respect for, paternal omnipotence; that dread and respect are powerful strongholds of resistance to change. Until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for the law, but that the law is made by and for men.[3]

Certainly the ideal of an adult personality has a therapeutic function where men's mystical faith in sacred cows is leading them astray. But the conception is so utterly materialistic that it will not serve as a permanent basis on which to rest the authority of courts. The trouble with it as a symbol of government was illustrated by that brilliant psychiatrist, Harry Stack Sullivan, in a sentence given at the end of a series of seminars at Yale. For three days he had explained to the class the effectiveness of the concept of the adult personality in relieving them of many of the troubles which he knew some of them had, and then he closed with the following:

> And now, gentlemen, when you have forgotten romance, when you have lost your taste for adventure, when the only things worthwhile to you are prestige and income, then you have grown up, then you have become an adult.

[3] Frank, Law and the Modern Mind 252 (1930).

The students were utterly bewildered. But what Sullivan was trying to say was that after men had gotten rid of the beliefs that frustrate them they must acquire a new faith that inspires them. Realistic jurisprudence is a good medicine for a sick and troubled society. The America of the early 1930's was such a society. But realism, despite its liberating virtues, is not a sustaining food for a stable civilization.

In such times it was important that Jerome Frank not add to his paragraph, which I have just quoted, an addendum which turned it inside out, as Harry Stack Sullivan did for the Yale students. It would have caused confusion of the purpose which Jerome Frank was striving to achieve. The authoritarian conception of "Law" in 1930 was indeed a great moral force but headed in the wrong direction. The old conceptions of the citizen's relationship to his government were out of step with the development of the revolutionary new economy of the 20th century. Jerome Frank was trying to free the law from its frustrating obsessions. His jurisprudence was the jurisprudence of therapy. The law was in desperate need of shock treatment. In this respect *Law and the Modern Mind,* Frank's first book, was a tremendously effective work. More than any other it cleared the way for a new set of conceptions and ideals with respect to the relationship of the citizen to his government.

To understand the tremendous value of Jerome Frank's realistic legal philosophy at the time it was written we must go back to the spiritual and economic troubles of the depression when *Law and the Modern Mind* appeared. America had plunged from the security and exuberant faith of the 1920's into a chasm of want and social disorganization. Arthur Schlesinger, Jr., has vividly described the crisis:

> The fog of despair hung over the land. One out of every four American workers lacked a job. Factories that had once darkened the skies with smoke stood ghostly and silent, like extinct volcanoes. Families slept in tarpaper shacks and tin-lined caves and scavenged like dogs for food in the city dump. In October the New York City Health Department had reported that over one-fifth of the pupils in public schools were suffering from malnutrition. Thousands of vagabond children were roaming the land, wild boys of the road. Hunger marchers, pinched and bitter, were parading cold streets in New York and Chicago. On the countryside unrest had already flared into violence. Farmers stopped milk trucks along Iowa roads and poured the milk into the ditch. Mobs halted mortgage sales, ran the men from the banks and insurance companies out of town, intimidated courts and judges, demanded a moratorium on debts. When a sales company in Nebraska invaded a farm and seized two trucks, the farmers in the Newman Grove district organized a posse, called it the 'Red Army,' and took the trucks back. In West Virginia, mining families, turned out of their homes, lived in tents along the road on pinto beans and black coffee.[4]

Nothing like this had occurred before in our history. No one understood why the most efficient nation in the world industrially could not distribute the

[4] Schlesinger, The Crisis of the Old Order 3 (1957).

goods which it could produce or why there should be poverty in the midst of plenty. No one could comprehend why America's tremendous productive capacity had become a curse instead of a blessing.

America had inherited certain fundamental legal concepts from the 19th century which were regarded as ultimate truths. These concerned property rights, competitive labor relations, unrestricted corporate power and a government whose only proper function was keeping law and order. These truths no longer seemed to work. Following these principles seemed no longer to give us security and dynamic energy.

The custody of these sacred principles was in lawyers and courts and law schools. Every practical measure the government took to build up the power of labor, to relieve farm distress, to alleviate the suffering of the unemployed, to create a more fluid currency, flew in the face of the fundamental ideals represented by the "Law." To ask lawyers or judges to abandon ideals which they held fundamental to an orderly society, the only bulwark against tyranny, was like asking a priest to give up his religion. It was nobler to suffer for these ideals, to endure want and poverty, firm in the conviction that if we made the proper sacrifices for these ancient truths they would some day lead us out of the wilderness. According to the accepted legal conceptions of the time, government action was destroying property rights; it was depriving labor of the common law right to competition for jobs at low wages; it was invading the accepted domain of great business organizations; it was violating the fundamental legal basis for taxation; it was abandoning the conception of liberty itself built up by the Constitution and the common law.

These conceptions made both our Constitution and common law a powerful reactionary force, embodying the legal principles of property, corporate independence, protection against labor demands, and the sacredness of debt. These principles in total effect were a denial of the government's right to be immediately and practically concerned with the welfare of its less fortunate citizens.

No one during the depression understood the fantastic production of which America had become capable as a source of wealth unknown before in history. Since men did not understand it they could not talk or think about it in terms of "Law." That new wealth did not consist of material things. It was intangible. It was the new art of industrial organization. This art was well under way long before the depression. It was soon to revolutionize the economy of the world. Henry Ford with his assembly line was perhaps its most significant pioneer. It soon became apparent that the conception of mass production by assembly lines could be applied not only to the production of material things, but also to the advancement of science. Scientific discovery did not have to wait for a flash of genius. The discovery of how to use atomic energy was strictly an assembly line operation. Invention was no longer a matter of

chance. The modern research organization is in itself the greatest productive machine of all time.

In the 19th century, the wealth of nations consisted of railroads, factories and goods. In the 20th century, wealth lies in great organizations themselves, not in the goods they produce. To preserve the old wealth which is tangible property is today a positive handicap. Fantastic as it may seem in terms of our old concepts, Germany today owes its competitive advantage over England partially to the fact that its factories were destroyed during World War II so that new ones could be built without offending the 19th century conception of waste.

The great American business enterprise was a revolutionary new technique of coordinating men, materials, machinery, science and psychology. This mighty complex of conditioned reflexes, once perfected, rolls along independently of personalities, functioning almost automatically. It is as different from its 19th century prototype as a disciplined army is different from a neighborhood gang. It approximates the automatic precision of a machine, pouring goods and services into a nation's economy at an accelerating rate undreamed of before in the world's history.

Operating under the legal conceptions of the 19th century such organizations had treated labor as a commodity. They had used their power to cannibalize small industry. They had thus destroyed purchasing power in the markets to which they sold. Yet any attempt to reform this process was in direct conflict with the great moral force of the higher law of property and of the relationships of great business enterprises to government which in the 19th century had been spelled out in terms of individual property rights in an economy of security.

In the eyes of the law, the great industrial organizations of the 20th century were individuals who owned property and possessed all of the rights conferred on individuals by that body of conceptions known as the common law.

During the depression years Jerome Frank had been working with the practical problems of corporate finance. The air was full of economic schemes, deceptively plausible. Jerome Frank adopted none of them. He had faith that America would work its way out of its economic and spiritual troubles if the obstructive legalisms of the times could be swept away. That his vision was right is evidenced by the fact that today only extremists question the new role of government, a role which was denounced when Jerome Frank wrote as a contradiction of all the traditional values of American law. The Supreme Court has recently reasserted its supremacy in the field of civil liberties, but since the great court packing fight in 1937, the Court has left economic matters largely to the wisdom of Congress and the state legislatures. The Supreme Court has not held an important act of Congress unconstitutional in fifteen years.[5]

For such times it is difficult to imagine a more effective ideal to lead the lawyers of America out of the wilderness than the point of view expressed by *Law and the Modern Mind.* He was telling the conservative lawyers and judges of America to grow up to the measure of the problems that faced them. He was the intellectual leader of the movement toward a different role of government fitted to the needs of the industrial revolution. His book was read with excitement and enthusiasm. It was the kind of a book that makes man free.

Law and the Modern Mind was one of the first books to attempt to apply the insights of modern psychiatry to the legal process. Frank was profoundly influenced by Freud's view that men, like children, yearn for unattainable certainty and security. Freud's studies into the unconscious led Frank to emphasize the internal forces and pressures which may shape the judgment in a particular case. Throughout his life, Frank was concerned with the ancient paradox of change and stability in the law. He felt that legal certainty was an unattainable goal. He called himself a "fact skeptic" and argued that even if legal rules were crystal clear, the results in many cases still could not be predicted with certainty because of the inherent uncertainty and subjectivity in the fact-finding process. It may be that he minimized the value of an authoritarian approach to law but it was important in the 1930's to emphasize the instrumental nature of law and to stress that legal rules are not commands from Mount Olympus which are eternal and unchangeable.

Jerome Frank's other books show the same spirit of skeptical inquiry. In *Fate and Freedom,* published in 1945, he was concerned with the problems of freedom and determinism. Frank was concerned by a problem raised by psychiatry. If all mental phenomena have causal antecedents and if adult behavior is determined by the manner in which a child is reared, is there any room for free will? Frank passionately believed that men could shape their destiny and he was unwilling to accept the complete logic of the determinist position held by Marxists, some scientists and some psychiatrists. His last book, *Courts on Trial,* is an appeal for necessary and long overdue reforms in courthouse administration. Jerome Frank was an appellate judge, but he believed that the trial court was the heart of the judicial process.

But it is on the basis of *Law and the Modern Mind,* read in connection with the times when it was written (as all writings on jurisprudence should be), that the admirers of Jerome Frank may justly claim that he was the most effective writer of his period in accomplishing the change in attitude toward

[5] The Court held that the provisions of the Uniform Code of Military Justice could not be constitutionally applied to civilian dependents of members of the armed forces. Reid v. Covert, SR: 354 U.S. 1 (1957). A federal criminal statute was declared unconstitutional on due process grounds in Tot v. United States, 319 U.S. 463 (1943). It could also be argued that an act of Congress was declared unconstitutional when the Court ruled that segregation of public school children in the District of Columbia was invalid. Bolling v. Sharpe, 347 U.S. 497 (1954).

the legal relations of the citizen and his government which was essential to accommodate our legal philosophy to the industrial revolution of the 20th century.

So much for the contribution of Jerome Frank. I will now come to the contribution of Judge Frank. As a judge, he believed in particular justice, not abstract justice. He felt that hard cases made only hard decisions. He played the judicial longshot: "Surely, even if but one out of a hundred attempted appeals by indigents has merit, justice compels the conclusion that that appeal shall be heard."[6] He refused to accept Fair Play as a rule of convenience; he never accepted the guise of law enforcement as a cover for individual abuse. No public retribution justified physical- or psychological-third degree[7] or deferred arraignment.[8]

He thought a judge's job was to judge, not prejudge. But he never succeeded in squelching his prejudice for fairness. He tempered rigid contract principles with ingenuity to ease a workman's claim for compensation.[9] Through tangles of tortious causation, he sighted bewildered widows and orphans.[10] When economic giants squared off, he held them to standards of personal justice.[11] He favored judicial efficiency—but without fanaticism. He threw up roadblocks when procedural speedups threatened individual substantive rights.[12]

He was a principal architect of New Deal economic controls, but he viewed them as a check on excesses, not a choke on enterprise. A man of rare imagination himself, he felt the laws rewarding man's imagination should not grant patents or trademarks for mundane creation.[13] He pierced officialese with the insight of an insider. He was skeptical of presumptions of administrative omniscience. He stripped the bureaucratic veil so he could pink the experts.[14]

The best example of Judge Frank's method of supporting his conclusions of law by research into relevant social, scientific, psychological and economic in-

[6] United States v. Johnson, 238 F.2d 565, 571 (C.A.2d, 1956).

[7] United States ex rel. Leyra v. Denno, 208 F.2d 605 (C.A.2d, 1953).

[8] United States v. Leviton, 193 F.2d 848 (C.A.2d, 1951).

[9] Ricketts v. Pennsylvania R. Co., 153 F.2d 757 (C.A.2d, 1946).

[10] Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (C.A.2d, 1954).

[11] In re New York, N.H. & H.R. Co., 197 F.2d 428 (C.A.2d, 1952).

[12] Arnstein v. Porter, 154 F.2d 464 (C.A.2d, 1946).

[13] Wabash Corp. v. Ross Electric Corp., 187 F.2d 577 (C.A.2d, 1951).

[14] NLRB v. Electronics Equip. Co., 194 F.2d 650 (C.A.2d, 1952); United States v. 449 Cases, Etc., 212 F.2d 567 (C.A.2d, 1954); Crowley's Milk Co. v. Brannan, 198 F.2d 861 (C.A.2d, 1952). Other interesting opinions by Judge Frank are: United States v. Forness, 125 F.2d 928 (C.A.2d, 1942) (Indian rights); Associated Industries v. Ickes, 134 F.2d 694 (C.A.2d, 1943) (constitutional and admiralty law); United States v. St. Pierre, 128 F.2d 979 (C.A.2d, 1942) (5th Amendment waiver); United States v. Malanaphy, 168 F.2d 503 (C.A.2d, 1948) (military jurisdiction); Gardella v. Chandler, 174 F.2d 919 (C.A.2d, 1949) (baseball and antitrust); Repouille v. United States, 165 F.2d 152 (C.A.2d, 1947) (aliens).

formation is found in the case of *United States* v. *Roth*.[15] The principal issue raised there was the constitutionality of the federal statute making it a crime to mail obscene literature. Here Judge Frank follows the Supreme Court as authority but challenges it to review its conclusion in the light of current scientific studies. On this issue Judge Frank said:

> I agree with my colleagues that, since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion). Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity with which, up to now, I think the Supreme Court has not dealt in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them.[16]

Judge Frank's challenge to the Supreme Court starts out with the recognized principle that under the First Amendment a federal statute may not penalize the distribution of any sort of literature except on the ground that there is a strong probability that the particular writings will incite the commission of overt anti-social acts. Then in the appendix to his opinion he establishes, at least to my satisfaction, by a brilliant analysis of current psychological and social research that while erotic literature may produce sinful thoughts there is no evidence whatever that it leads to unlawful conduct of any kind.

Particularly persuasive is his analysis of juvenile delinquency, to which obscene literature and comics depicting violence are supposed to contribute. He shows that juvenile delinquency is the product of broken homes, of internal stresses and of insecurity. Nowhere in the vast research literature on the cause of juvenile delinquency is there evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts.

If it be true that "obscene" literature gives rise to fantasies and impure thoughts rather than to unlawful conduct, the legal justification for the federal obscenity statute is gone. It can then rest only on our feeling that the post office should not carry offensive literature in the mails. That is the kind of feeling that justifies all schemes of censorship. But the First Amendment forbids the enforcement of such an attitude by the criminal law. Such enforcement threatens all freedom of expression of unconventional ideas. In illustrating this danger Judge Frank points out the effect on publishers of the mere existence of obscenity as a federal crime. He says:

> Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically, fear of prosecution. For most men dread indict-

[15] 237 F.2d 796 (C.A.2d, 1956).

[16] Id., at 804.

ment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene, a person threatened with prosecution if he mails (or otherwise sends in interstate commerce) almost any book which deals in an unconventional, unorthodox, manner with sex, may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion.[17]

Not only does the obscenity statute make the prosecutor a censor in advance, it makes judges and jurors censors after the case has been brought, on standards too vague for consistent application.

In an area governed by taboos and moral prejudices, such as is involved in the determination of what is obscene, it took courage to make this analysis. The remarkable thing about Judge Frank's opinion in this case is the way that he utilizes the scientific, sociological and psychological learning of our time in a basic constitutional argument. The reader of this opinion will find his former prejudices swept aside. He will have new factual insight on the problem of the effects of obscenity on actual conduct and the danger to freedom of expression of allowing our moral ideas of what is disquieting literature to find their expression in the criminal code.

Although a majority of the Supreme Court did not follow Judge Frank,[18] his opinion was at least provocative enough to induce the Supreme Court to grant certiorari on an issue which the lower court had considered to be settled. There are few opinions like it—indeed, there are no opinions like it, in American case law.

For at least twenty-five years there has been a movement centered in progressive law schools to unite the law with the social sciences. The Yale Law School, under the leadership of Dean Hutchins, may justly claim to have made the first organized effort along these lines. He induced the Rockefeller Foundation to advance funds to support an Institute of Human Relations where men of all social disciplines gathered together and attempted to study the law "objectively." Yale began by collecting statistics about the judicial process. IBM machines were purchased to count cards adequately perforated mechanically to fall in the proper classification. These statistics are still around somewhere but no one has yet discovered what to do with them. Today both Yale and the University of Chicago are announcing competitively that they are in the process of making the law and all other relevant social sciences one

[17] Id., at 820.

[18] Roth v. United States, SR: 354 U.S. 476 (1957). It appears, however, that at least five justices are willing to permit federal administrative censorship of allegedly obscene matter. See the dissenting opinions in Roth v. United States, supra, and in SR: Kingsley Brooks, Inc. v. Brown, 354 U.S. 436 (1957), which reflect some of Frank's views.

single discipline which may be useful to judges and lawyers alike. The effect of these efforts on the actual administration of the law is yet to be proved. I emphasize here that the first man who actually made the social sciences (he called them "social studies") servants of the law without violating the strict canons of judicial logic was Jerome Frank. Others talk about it; he actually did it. If a real union between the law and social science is at all possible, the method of Judge Frank, illustrated by the *Roth* case, points the way. His success in making this fusion may be his most enduring monument.